

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

SFA SYSTEMS, LLC,

Plaintiff,

v.

1-800-FLOWERS.COM, INC., et al,

Defendants.

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**CASE NO. 6:09-cv-340
PATENT CASE**

SFA SYSTEMS, LLC,

Plaintiff,

v.

BIGMACHINES, INC., et al,

Defendants.

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**CASE NO. 6:10-cv-300
PATENT CASE**

**DEFENDANTS’ MOTION TO STRIKE
UNDISCLOSED EXTRINSIC EVIDENCE FROM SFA’S P.R. 4-5(c) BRIEF**

In direct contravention of this Court’s local patent rules, Plaintiff SFA Systems, LLC (“SFA”) furtively cites for the first time in its P.R. 4-5(c) reply brief **twelve new, previously undisclosed** items of extrinsic evidence in support of its proposed construction for the claim term “event manager.” (See Pl.’s P.R. 4-5(c) Br. at exs. E, F-P, Dkt. No. 271.)¹

Although P.R. 4-2(b) requires parties to identify the extrinsic evidence upon which they intend to rely, SFA failed to disclose this extrinsic evidence in its P.R. 4-2 disclosure due January 21, 2011. (Defs.’ P.R. 4-5(b) Br. at ex. K, Dkt. No. 260.) And although P.R. 4-3(b)

¹ All cites to Docket entries herein reference Civil Action No. 6:09-CV-340.

requires parties to identify “any extrinsic evidence” they intend to use either to support their own constructions or to oppose another party’s constructions, SFA again failed to disclose this extrinsic evidence in the P.R. 4-3 joint claim construction statement due February 8, 2011. (Dkt. No. 247.) Further, SFA failed to disclose this extrinsic evidence in its expert declaration due February 18, 2011. (*See* Pl.’s P.R. 4-5(a) Br. at ex. I, Dkt. No. 256.) Rather than comply with any of the Court’s local rules requiring an orderly disclosure of evidence so that the other side can fairly review and address the evidence, SFA chose to unload the new evidence on the Court and the Defendants roughly one week prior to the Markman hearing so that neither Defendants nor their expert, Dr. Greenspun, are afforded a fair opportunity to respond. Under the local rules and the Court’s docket control order, SFA should have disclosed its evidence **sixty-four** days earlier, in its P.R. 4-2 disclosures. Unlike SFA, Defendants diligently complied with their own disclosure requirements and would suffer prejudice if SFA’s sandbagging tactic were allowed to succeed.

Most troubling, moreover, is that rather than a simultaneous exchange of expert declarations, Defendants **voluntarily agreed** to provide Dr. Greenspun’s declaration **first**, thus (1) affording SFA’s expert, Mr. Myers, the opportunity to prepare a tailored rebuttal declaration and (2) affording SFA a preview of the blueprints to Defendants’ arguments so that SFA could preempt Defendants’ arguments in its P.R. 4-5(a) opening brief, and if need be, request permission from the Court to supplement its P.R. 4-2 and 4-3 extrinsic evidence disclosures. Indeed, Defendants even agreed to a **unilateral extension of time** for SFA to serve its expert declaration. Yet even with explicit notice of its evidentiary deficiencies per Dr. Greenspun’s expert declaration, SFA still chose to spring these twelve pieces of extrinsic evidence on the Defendants roughly one week before the Markman hearing.

As a result, Dr. Greenspun was not provided any opportunity to review and provide expert opinion on this new evidence, like the detailed and unrebutted analyses Dr. Greenspun provided regarding the four pieces of extrinsic evidence SFA actually did disclose in its P.R. 4-2 statement. For that evidence **of record**, Dr. Greenspun indisputably establishes that none of it proves that the term “event manager” was a term of art **connotative of sufficiently definite structure**, and that even if it was, nowhere is it established that such structure is **sufficient to perform the functions recited**, *i.e.*, the alternative Federal Circuit test that SFA and its expert choose to wholesale ignore. (*See* Defs.’ P.R. 4-5(b) Br. at ex. A, ¶¶ 52-62, Dkt. No. 260.) Defendants and Dr. Greenspun, however, are without recourse to address SFA’s **new** evidence with less than a week before the Markman hearing.

In summary, the Court’s local patent rules make clear that **both** sides must litigate fairly, disclose evidence timely, and maintain integrity before the Court. Defendants therefore respectfully request that the Court strike all new, previously undisclosed extrinsic evidence and any references to it from SFA’s P.R. 4-5(c) reply brief.

Dated: March 30, 2011

Respectfully Submitted,

FISH & RICHARDSON P.C.

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CERTIFICATE OF CONFERENCE

Counsel for Defendants and Plaintiff conferred on March 30, 2011 regarding the relief sought in this motion. Plaintiff is opposed. The parties are at an impasse and need the assistance of the Court to resolve this issue

/s/ Ajit Dang
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on March 30, 2011. Any other counsel of record will be served by first class mail.

/s/ Neil J. McNabnay
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